

**ORIGINAL**

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

**RECEIVED**

In the Matter of )

SEP 18 2002

Applications of AMERITECH CORP., )  
 Transferor, )FEDERAL COMMUNICATIONS COMMISSION  
 OFFICE OF THE SECRETARY

AND )

CC Docket No. 98-141

SBC COMMUNICATIONS INC., )  
 Transferee )For Consent to Transfer Control of )  
 Corporations Holding Commission Licenses )  
 And Lines Pursuant to Sections 214 )  
 And 310(d) of the Communications Act )  
 And Parts 5, 22, 24, 25, 63, 90, 95 and 101 )  
 of the Commission's Rules )

**REPLY OF Z-TEL COMMUNICATIONS, INC.**  
**TO SBC'S OPPOSITION**

Z-Tel Communications, Inc. ("Z-Tel"), through its undersigned counsel, hereby files its reply to the September 13, 2002 Opposition of SBC Communications Inc. ("SBC") to Z-Tel's Petition to Extend Merger Conditions ("Opposition" or "SBC Op.").

**I. INTRODUCTION AND SUMMARY**

For all of its inflammatory rhetoric, SBC makes no effort to rebut the fundamental point of Z-Tel's Petition: the public interest benefits of the SBC/Ameritech merger and the merger conditions have failed to materialize. As a result, the Commission simply must grant Z-Tel's Petition and toll the expiration of all SBC/Ameritech merger conditions pending Commission review of whether and to what extent: (1) public interest benefits have resulted

No. of Copies rec'd 0114  
 List ABCDE

from the merger of SBC and Ameritech, and (2) the merger remains consistent with the public interest given SBC's well-documented failure to comply with the letter and the spirit of the merger conditions. As WorldCom correctly notes, "[a]n investigation will likely reveal that the public interest balance has been dramatically skewed in the wrong direction." WorldCom Comments, 2.

In its Opposition, SBC attempts to discredit Z-Tel by noting its "strong protest against" what SBC alleges are "deliberate misrepresentations" by Z-Tel. SBC Op., 5. Indeed, SBC has the unexpurgated nerve to suggest that Z-Tel's Petition is neither "responsible advocacy" nor "respectable advocacy." *Id.* Coming from the Rasputin of BOC advocacy, Z-Tel normally would view such invective as a badge of honor. In this instance, however, Z-Tel cannot do so, as in its Petition (unlike SBC's Opposition), Z-Tel substantiated every single fact presented with authority cited in and attached to the Petition. Lest there be any doubt whatsoever, **Z-Tel stands by every single line of its Petition.**

SBC's Opposition centers around its fundamental view that it is simply too late for the Commission to take any action to ensure that the Merger yields net public interest benefits. Toward that end, SBC makes three basic arguments. First, SBC asserts that the Commission "has no power to grant" Z-Tel's Petition because "the merger conditions were a set of voluntary commitments with specific sunset date." SBC Op., 1. Second, SBC claims that its "overall record of compliance with the merger conditions has been excellent." *Id.*, 2. Third, SBC states that "extending the merger conditions would be bad public policy." *Id.* As demonstrated below, SBC is flatly incorrect on all counts.

## II. THE COMMISSION POSSESSES THE AUTHORITY TO GRANT THE RELIEF REQUESTED BY Z-TEL

In spite of SBC's unsupported laments to the contrary, the relief requested in Z-Tel's Petition is clearly within the scope of the Merger Order. As the Commission noted:

We expect that ... **all telecommunications carriers and the public are able to obtain the full benefits of these conditions.** If SBC/Ameritech does not fulfill its obligation to perform each of these conditions, pursuant to our public interest mandate under the Communications Act we **must ensure that the merger remains beneficial to the public.** We intend to utilize every available enforcement mechanism, including, if necessary, revocation of the merged firm's section 214 authority, to ensure compliance with these conditions. To this end, should the merged entity systematically fail to meet its obligations, we can and will revoke relevant licenses, or require the divestiture of SBC/Ameritech into the current SBC and Ameritech companies. Although such action would clearly be a last resort, **it is one that would have to be taken if there is no other means for ensuring that the merger, on balance, benefits the public.**<sup>1</sup>

SBC completely ignores this express Commission directive because SBC well knows that: (1) neither telecommunications carriers nor consumers have been able to obtain the full benefits of the merger conditions, and as a result, (2) the merger, on balance, has not and does not benefit the public.

SBC concedes – because it must concede – that the Commission would have rejected as contrary to the public interest the SBC/Ameritech merger but for the imposition of “significant and enforceable conditions designed to mitigate the ... harms of the[] merger.”<sup>2</sup> SBC attempts to take refuge in its “bargain,” which SBC asserts “cannot be unilaterally altered by the Commission.” *Id.*, 3. SBC omits, however, that the “bargain” struck requires SBC to

<sup>1</sup> *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, CC Docket 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14858, ¶360 (1999) (“Merger Order”).*

<sup>2</sup> *Id.*, 14716, ¶2.

“change the public interest balance”<sup>3</sup> and overcome the identified “significant harms”<sup>4</sup> of the merger.

As Z-Tel has demonstrated in its Petition (and further elaborated below), SBC has not lived up to its bargain, and the Commission must therefore find some means for ensuring that the merger, on balance, benefits the public.<sup>5</sup> At a minimum, the showing made by Z-Tel in its Petition – without more – warrants grant of Z-Tel’s Petition with the associated launch of an immediate public investigation of whether the merger, on balance has benefited the public interest.

### **III. SBC’S COMPLIANCE WITH THE MERGER CONDITIONS IS AT BEST SUSPECT, NOT “EXCELLENT”**

SBC asserts that its “overall record of compliance with the merger conditions is excellent.” SBC Op., 4. Nothing could be further from the truth. As Z-Tel explained in its Petition, and as elaborated below, SBC’s movements toward compliance with the market opening provisions of the merger conditions have resulted from litigation, not from good faith efforts by SBC.<sup>6</sup> Moreover, new information has come to Z-Tel’s attention which fundamentally

---

<sup>3</sup> *Id.*, 14717, ¶4.

<sup>4</sup> *Id.*, 14716, ¶2. *See also* 14743, ¶62 (“absent stringent conditions, we would be forced to conclude that this merger does not serve the public interest, convenience or necessity because it would inevitably retard progress in opening local telecommunications markets, thereby requiring us to engage in more regulation. Standing alone, without conditions, the initial application proposed a license transfer that would have been inconsistent with the approach to telecommunications regulation and telecommunications markets that the Congress established in the 1996 Act.”).

<sup>5</sup> *Id.*

<sup>6</sup> SBC attempts to make much of what it calls an “explosion of competition” in the Ameritech states. SBC provides no support for its data, aside from a vague reference to an “extrapolation from interconnection trunks,” and Z-Tel in no way accepts SBC’s assertions. However, Z-Tel does note that, to the extent CLECs have been successful in the Ameritech states, this success has resulted from CLEC litigation victories and the hard work of the various public service commissions, not SBC’s efforts to implement the federal merger conditions.

calls into question the accuracy of SBC's performance data. Regarding its "compliance" with its out-of-region entry commitments, not even SBC claims that it has engaged in any real effort to bring to consumers the "benefit from facilities-based competitive service by a major incumbent LEC."<sup>7</sup> Z-Tel again stands by the statements in its Petition and in this section addresses the fundamentally suspect nature of SBC's compliance with both the in-region market opening merger conditions and the out-of-region "National/Local" merger conditions.

**A. SBC's Carrier-to-Carrier Performance Data Is Fundamentally Suspect**

In an unsupported attempt to defend its operations support system ("OSS") performance and related performance data, SBC alleges that it "is meeting well in excess of 90% of its [Carrier-to-Carrier Performance] measures." SBC Op., 7. SBC notes that its "voluntary performance payments"<sup>8</sup> "have trended downward and have reached their lowest levels in the last couple of months." *Id.*, 8. According to SBC, "[t]his demonstrates SBC's commitment to improving performance to CLECs and the success of the merger in importing SBC's OSS expertise into the Ameritech region." *Id.*

Even assuming SBC's assertions are true, SBC is still falling significantly short of the *minimum* requirements of the Carrier-to-Carrier performance plan. The Carrier-to-Carrier performance plan simply does not, as SBC would lead one to believe, require "perfection." *Id.*, 7. Rather, the Carrier-to-Carrier performance plan consists of minimum requirements that SBC continues to fail to meet – even based on SBC's self-scoring of its performance.

---

<sup>7</sup> Merger Order, 14877, ¶398.

<sup>8</sup> Apparently, in SBC doublespeak, "voluntary performance payments" are different than "fines."

As noted above, Z-Tel believes that SBC's self-reported performance is suspect at best, and Z-Tel has new-found reason for its suspicion of SBC's self-reporting. Shortly after filing its Petition, Z-Tel became aware that the Texas Public Utility Commission has become so concerned about SBC's "flow through" performance, that it has begun its own independent audit of SBC.<sup>9</sup> Perhaps of greater concern, Z-Tel has become aware of a whistle-blower complaint filed by a former SBC employee against SBC. See Plaintiff's Original Petition, *Demetrius T. Davis, Sr. v. SBC Communications Inc.*, Cause 02-6951 (Dist. Ct. Dallas County, TX, Aug. 7, 2002) (attached hereto as Exhibit B). In that complaint, complainant alleges, among other things that:

In the course of Plaintiff's employment by Defendant, Plaintiff, among others, was regularly requested to make false record with respect to the timeliness of Defendant's response to orders by CLECs in a manner not consistent with the requirements of the FCC and PUC, specifically to either modify the date and time of the receipt of a service order or the alleged response to a service order or make a record ... suggesting that the CLEC which delivered any particular service order had been contacted and asked to consent to an extension of time for Defendant to respond to the service order, and so consented, when no such contact had actually been made. *Id.*, ¶ 4.

The complaint further alleges that SBC began directing its employees to engage in such practices in "late 2001" because SBC's "exposure to liquidated damages [*e.g.*, 'voluntary performance payments'] for delays in response to CLEC service orders was unacceptably high." *Id.*, ¶ 5.

SBC no doubt has denied or will deny these allegations. Notwithstanding SBC's denials, the complaint stands and should be of particular interest to the Commission given SBC's record of misstatements before the Commission, which Z-Tel noted in its Petition and has no

---

<sup>9</sup> A copy of the Texas Public Utility Commission's Request for Proposal on this audit is attached hereto as Exhibit A. Z-Tel also understands that the Texas Public Utility Commission has engaged Hewlett Packard for this audit.

need to repeat here. Z-Tel will reiterate, however, that the Commission – as recently as this past February – warned SBC that “inaccurate reporting of performance data may compromise the effectiveness of the merger conditions in promoting open local markets.”<sup>10</sup>

At bottom, each of the successive audit reports provided under the merger conditions has reinforced the plain fact that SBC simply has not lived up to its promises to the Commission, and recent events in Texas suggest that SBC’s performance may actually be well short of that reported to the Commission. In any event, there can simply be no doubt that neither consumers nor competitors have obtained the benefits that the Commission relied upon in finding that the merger was in the public interest.

**B. SBC’s “Compliance” with the Out-of-Region Entry Requirements Is Fundamentally Suspect**

SBC relies on one piece of evidence in its claim that it has satisfied its National/Local entry requirements: a single letter from an SBC vice president asserting compliance. That single letter contains no discussion SBC’s products, pricing, or success in bringing “the essentially simultaneous, facilities-based entry of the combined company into each of the Top 30 major U.S. markets outside of the area in which the combined company would be the incumbent carrier.”<sup>11</sup> Nor does this single letter explain how SBC’s efforts have “ensure[d] that residential consumers and business customers outside of SBC/Ameritech’s territory benefit from facilities-based competitive service by a major incumbent LEC.”<sup>12</sup> Instead of explaining how its National/Local rollout has resulted in public interest benefits, SBC instead asks that the Commission adopt a “trust me” approach to this important merger condition.

---

<sup>10</sup> Letter from Carol E. Matthey, Deputy Chief, Common Carrier Bureau to Caryn D. Moir, SBC, ASD File No. 99-49 (Feb 6, 2002).

<sup>11</sup> *Merger Order*, 14826, ¶259; *see also* SBC/Ameritech Application at 5.

<sup>12</sup> *Id.*, 14877, ¶398.

SBC's Opposition, not surprisingly, says nothing to rebut Z-Tel's demonstration that SBC's National/Local rollout has brought no benefit to consumers, and is nothing more than a sham effort to comply with the merger condition. The reason for this is simple: SBC is unwilling to actually compete outside of its territory, even with the availability of allegedly "below-cost wholesale pricing."<sup>13</sup> Indeed, if UNEs were in fact "below cost," SBC's best economic opportunity would be to utilize UNEs to expand into out-of-region markets. Yet the record is bereft of any evidence of SBC purchasing even one UNE. Moreover, although SBC apparently has installed some equipment, the record contains no evidence of any meaningful effort by SBC to win out-of-region customers. Quite the contrary, in spite of the availability of "below cost" UNEs, the evidence presented in Z-Tel's Petition shows that SBC has retrenched its efforts to provide out-of-region service, and SBC has made absolutely no effort to rebut that evidence.

#### **IV. SOUND PUBLIC POLICY REQUIRES GRANT OF Z-TEL'S PETITION**

Contrary to SBC's assertion, SBC Op., 11-12, sound public policy requires grant of Z-Tel's petition. The reason for this is obvious: consumers and all companies subject to the Commission's orders, rules, and regulations simply must have the ability to rely upon and expect enforcement of the Commission's orders.

SBC, in effect, suggests that since Chairman Powell is averse to merger conditions, the Commission neither needs to enforce its Merger Order nor ensure that net positive public interest benefits result from the merger. *See id.* What SBC omits, however, is

---

<sup>13</sup> See, e.g., "Telecommunications Reform Needed to Protect Consumers, SBC President Bill Daley Says," SBC Press Release (Sept. 13, 2002) (attached hereto as Exhibit C).

one simple fact: without the merger conditions, the Commission would have rejected the merger.

Perhaps the Commission should have rejected outright the SBC/Ameritech merger; however, the Commission did not do so. Instead, to “change the public interest balance”<sup>14</sup> and overcome the identified “significant harms,” the Commission imposed “significant and enforceable conditions designed to mitigate the ... harms of the[] merger, to open up the local markets of these ... RBOCs, and to strengthen the merged firm’s incentive to expand competition outside its regions.”<sup>15</sup> The Commission, in no uncertain terms, indicated that it would do what it takes to ensure “that the merger remains beneficial to the public.”<sup>16</sup> Indeed, as noted, the Commission unequivocally stated its intent “to utilize every available enforcement mechanism, including, if necessary, revocation of the merged firm’s section 214 authority, to ensure ... that the merger, on balance, benefits the public.”<sup>17</sup> Consumers and carriers, such as Z-Tel, rely on such statements and expect that the Commission will, in fact, do what it says it will do. Sound public policy requires the Commission to support its orders with firm and swift action.

## V. CONCLUSION

In its Petition and in this reply Z-Tel has demonstrated that neither telecommunications carriers nor consumers have obtained the full benefit of the merger conditions. As a result, there can be no doubt that SBC’s alleged implementation of the merger

---

<sup>14</sup> *Id.* at 14717, ¶4.

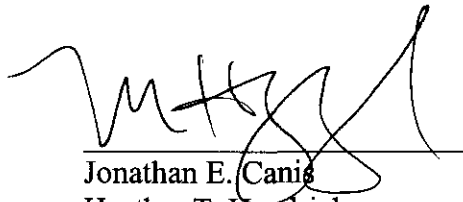
<sup>15</sup> *Id.* at 14716, ¶2.

<sup>16</sup> *Id.* at 14858, ¶360.

<sup>17</sup> *Id.*

conditions has failed to "change the public interest balance."<sup>18</sup> Thus, the Commission should grant Z-Tel's Petition and toll the expiration of all SBC/Ameritech merger conditions pending Commission review of whether and to what extent: (1) public interest benefits have resulted from the merger of SBC and Ameritech, and (2) the merger remains consistent with the public interest given SBC's well documented failure to comply with the letter and the spirit of the merger conditions.

Respectfully submitted,



Thomas M. Koutsy  
Vice President – Law and Public Policy  
Z-Tel Communications, Inc.  
601 South Harbour Island Blvd.  
Tampa, Florida, 33602  
(813) 273-6261

Jonathan E. Canis  
Heather T. Hendrickson  
KELLEY DRYE & WARREN LLP  
1200 19<sup>th</sup> Street NW, Suite 500  
Washington, D.C. 20036  
(202) 955-9600

Michael B. Hazzard  
KELLEY DRYE & WARREN LLP  
8000 Towers Crescent Drive, Suite 1200  
Vienna, VA 22182  
(703) 918-2300

COUNSEL FOR Z-TEL COMMUNICATIONS, INC.

DATED: September 18, 2002

---

<sup>18</sup> *Id.*, at 14717, ¶4.

## CERTIFICATE OF SERVICE

I, Charles "Chip" M. Hines III, hereby certify that a true and correct copy of the foregoing "Z-Tel Reply; CC Docket No. 98-141" was delivered this 21<sup>st</sup> day of August 2002 to the individuals on the following list:

Marlene H. Dortch, Secretary (O + 14 + D)  
Federal Communications Commission  
445 12<sup>th</sup> St. SW, CY-B402  
Washington, DC 20554

Anthony J. Dale  
David H. Solomon  
Maureen F. DelDuca  
Enforcement Bureau  
Federal Communications Commission  
445 12<sup>th</sup> St. SW  
Washington, DC 20554

Qualex International (1R)  
Federal Communications Commission  
445 12<sup>th</sup> St. SW, CY-B402  
Washington, DC 20554

Gary L. Phillips  
Christopher Heimann  
SBC Communications Inc.  
1401 I St. NW, Suite 400  
Washington, DC 20005

Paul K. Mancini  
SBC Communications Inc.  
175 E. Houston  
San Antonio, TX 78205

Michael K. Kellogg  
Kellogg, Huber, Hansen, Todd & Evans, PLLC  
Sumner Square  
1615 M St. NW, Suite 400  
Washington, DC 20036

Thomas M. Koutsky  
Z-Tel Communications, Inc.  
601 S. Harbour Island Blvd.  
Tampa, FL 33602

Jonathan E. Canis  
Heather T. Hendrickson  
KELLEY DRYE & WARREN LLP  
1200 19<sup>th</sup> St. NW, Suite 500  
Washington, DC 20036

Michael B. Hazzard  
KELLEY DRYE & WARREN LLP  
8000 Towers Crescent Dr., Suite 1200  
Vienna, VA 22182



Charles "Chip" M. Hines III

---

## **EXHIBIT A**

PROJECT NO. 20400  
PUBLIC UTILITY COMMISSION OF TEXAS  
REQUEST FOR PROPOSALS  
FOR A COMPLIANCE AUDIT OF

**Southwestern Bell Telephone Company**  
**Performance Measures**

FOR THE PERIOD DESCRIBED IN THIS REQUEST  
TO BE CONSIDERED PROPOSALS MUST BE RECEIVED BEFORE  
THREE O'CLOCK P.M., November 2, 2001

**Key Dates**

Proposal Due Date: November 2, 2001  
Commission Staff Recommendation: November 13, 2001  
Comments on Selection of Third Party Auditor: November 26, 2001  
Selection of Third Party Auditor: first December Open Meeting (December 7, 2001)  
Detailed Audit Plan Due: December 10, 2001  
Audit Start (Approximate Date): December 20, 2001  
Final Report (Approximate Date): March 14, 2002

**Contents**

- 1.0 Introduction
- 2.0 Audit Objectives and Scope
- 3.0 Information Required from the Proposer
- 4.0 Criteria for Selection
- 5.0 Project Administration
- 6.0 Conditions
- 7.0 Procedures for Submitting Proposals

## 1.0 INTRODUCTION

- 1.1 **Purpose.** This Request for Proposals (RFP) provides interested contractors with the information necessary to prepare and submit proposals to the Public Utility Commission of Texas (PUC or Commission) regarding the conduct of a compliance audit of the Southwestern Bell Telephone Company Performance Measures set forth in the attached Texas Public Utility Commission Audit Plan to Address PM 13 Flow-Through and LMOS issues (Commission Audit Plan, attached as Attachment A).
- 1.2 **Issuing Office Authority.** This audit is being undertaken pursuant to the Commission's Section 271 Compliance Monitoring of Southwestern Bell Telephone (SWBT). The Commission will use the audit to determine whether SWBT remains in compliance with Section 271 of the federal Telecommunications Act, 47 U.S.C. 271.
- 1.3 **Description of Performance Measures.** Section 271 of the federal Telecommunications Act of 1996 allowed the Bell Operating Companies (BOCs), including SWBT, to provide in-region, interLATA service after the BOC proved that it had opened the local telecommunications market to competition. Although the Federal Communications Commission (FCC) has ultimate approval authority over a BOC's Section 271 application, the FCC relies upon state commissions to develop detailed and extensive factual records.

Through PUC Project No. 16251, the Texas Commission worked with SWBT and competitive local exchange carriers (CLECs) for almost two years before recommending that the FCC approve SWBT's Section 271 application. As part of the PUC's review of SWBT's Section 271 application, the Commission, with the assistance of SWBT and the CLECs, developed a set of clearly defined performance measurements and standards that measure the performance SWBT provides to its wholesale customers, CLECs. The Commission also developed a performance remedy plan. The performance measures and the performance remedy plan were intended to provide incentives for SWBT to provide parity performance to CLECs or provide CLECs with performance that afforded them a meaningful opportunity to compete and to discourage backsliding by SWBT. The Commission, through Project No. 20400, also put into place a six-month review process to allow modification, addition or deletion of existing measurements based upon input from SWBT and CLECs.

- 1.4 **Proposals.** To be considered for selection, proposers must submit a complete response to this RFP, following the format provided in Section 3 and the procedures provided in Section 7. Each proposer must submit an original proposal and seven (7) copies to the PUC. The proposal must remain valid for at least ninety days after the proposal due date and it must be signed by an official authorized to bind the proposer to its provisions. The proposal must also contain a notarized statement of compliance with Section 6.1. entitled "Independent Price Determination." Any questions regarding proposals should be sent in writing to Susan Durso, General Counsel, Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326; fax (512) 936-7003; or email [susan.durso@puc.state.tx.us](mailto:susan.durso@puc.state.tx.us)

- 1.5 **Proposal Timing.** To be considered, the proposal must be filed in the Central Records Division of the PUC in Project 20400 on or before 3:00 p.m., C.S.T., Friday, November 2, 2001.
- 1.6 **Audit Date.** The due date for the final Audit Report will be approximately March 14, 2002.

## **2.0 GENERAL REQUIREMENTS, OBJECTIVES AND SCOPE**

- 2.1 **General Requirements.** The audit is to take the form of an agreed-upon procedures review, conducted in accordance with Attachment A, the Texas Public Utility Commission Audit Plan to Address PM 13 Flow-Through and LMOS issues ("Commission Audit Plan"). The contractor will agree to comply with the General Requirements contained in section I of the Commission Audit Plan.
- 2.2 **Objectives.** The objectives of this audit are set out in Attachment A, Commission Audit Plan.
- 2.3 **Scope.** The audit shall cover performance measurement data of the following SWBT states: Arkansas, Kansas, Missouri, Oklahoma and Texas.

## **3.0 PROPOSAL REQUIREMENTS**

- 3.1 **Cover Page.** Proposals should include a cover page which clearly states the name of the company and the name, address, and telephone number of the proposer's account manager who may be contacted regarding the proposal.
- 3.2 **Qualification Statements.** Proposers must provide statements affirming the following:
- A. The contractor is qualified to conduct the type of agreed-upon procedures review provided for under the Commission Audit Plan.
  - B. The contractor meets the independence requirements of the Standards for Audit of Governmental Organizations, Programs, Activities and Functions, 1981 revision, published by the U.S. General Accounting Office.
  - C. The contractor does not have a record of substandard audit work.
- 3.3 **Activity Plan.** Each proposer will provide an Activity Plan through which the proposer will describe clearly, specifically, and as completely as possible, the technical design for carrying out the requirements of the Commission Audit Plan. The proposer must develop a test for each of the objectives contained in the Commission Audit Plan, including a description of the audit services the proposer will render, and a discussion of the methods

the contractor will use to fulfill the audit objectives. The proposal must communicate an understanding of the tasks to be performed, and identify potential problems in carrying out the tasks, and methods to identify and solve such problems.

The Activity Plan must address the possible audit of PM 59-09, PM 65-09, PM 65.1-09, PM 66-02, PM 67-09 and PM 69-09 (line sharing performance measures), as detailed in Paragraph II.B.3.f.7 of the Commission Audit Plan.

- 3.4 **Personnel.** The proposer should identify the professional personnel to be employed in the project and describe their qualifications.
- 3.5 **Experience.** The proposer should provide a list of compliance audits conducted by the proposer's company, including the date of completion, the client's name and specifically indicate any relevant audit experience in the telecommunications industry.
- 3.6 **Minority Firm Participation** It is an objective of the PUC to promote the professional employment of minority individuals by PUC contractors. Proposers should state the percentage of the total estimated audit hours that will be performed by either minority or women employees or subcontractors. The PUC encourages the participation of minority subcontractors and will take such participation into account in evaluating proposals.
- 3.7. **Potential Conflicts of Interest.** The proposer shall identify any relationships between itself or its employees and any telecommunications carrier and its employees. If there have been no such relationships, a statement to that effect must be included in the proposal. A conflict of interest would include performing consulting, audit or like work for a telecommunications carrier. Entities with conflicts of interest as determined by the PUC will not be eligible to serve as the contractor for the proposed contract. The PUC in its sole discretion will determine whether a conflict of interest exists and whether that conflict renders the proposer ineligible.

In addition, the contractor selected must agree not to perform subsequent work for SWBT for a period of one-year following completion of the audit without prior approval of the Commission.

- 3.8 **Cost and Price Analysis.** The information requested in this section is required to support the reasonableness of the quotation, and pursuant to the requirements in Section 6.0 of this RFP the proposer must not reveal or discuss the proposal with competitors. The following format must be used. The award will not be made solely on the basis of cost, but on the best value offered.
- A. **Professional Fees.** Itemize the estimated total hours, the rate per hour, and the total cost for each person and/or personnel category that will participate in the audit.
- B. **Per Diem or Meals Expenses.**

- C. Lodging Expenses.
- D. Airfare Expenses.
- E. Ground Transportation Expenses.
- F. Overhead Expenses, including photocopying, delivery and phone expenses.
- G. Support Services, including computer services, word processing and clerical services.
- H. Other Expenses (specify other expected expenses).
- I. Statement of Independent Price Determination Include a sworn statement by the person or persons within the organization responsible for the prices being offered in the proposal, or by the duly authorized agent of such person or persons, substantially as follows: "The cost and price analysis is submitted in full compliance with the provisions of the section entitled 'Independent Price Determination' in Part 6.1 of the RFP to which this proposal is a response."

A proposal will not be considered for award if the sworn statement is not included with the proposal, or if the sense of the statement has been altered so as to delete or modify paragraphs (a), (b), or (c) in the Independent Price Determination Section 6.1 of this proposal.

- 3.9 **Two Pricing Proposals Required** A response to this RFP will require two pricing proposals: The first pricing proposal must include all of the services applicable to the Commission Audit Plan with the exception of Paragraph II.B.3.f.7. The second pricing proposal will provide a price for services that may become necessary pursuant to Paragraph II.B.3.f.7 of the Commission Audit Plan.
- 3.8 **Additional Information and Comments.** Include any other information that is believed to be pertinent but not specifically requested elsewhere.

#### 4.0 CRITERIA FOR SELECTION

- 4.1 **Selection Process.** An evaluation team comprised of PUC personnel will identify those proposals that most closely meet the requirements of the RFP and will evaluate those proposals. Each proposal will be individually scored based on the selection criteria noted herein. Thereafter the evaluation team will meet as a group to discuss the proposals relative to one another. Depending upon the outcome of the initial meeting, staff may request further information from any or all of the proposers. Staff may consider other information provided as a result of its request and may meet again to further evaluate the proposals. Proposers receiving the most favorable ratings from the

evaluation team may be asked to send a representative to Austin, Texas for oral presentation and discussion of the project. Proposals may be rated again following oral presentations.

Recommendations of the evaluation team will be assembled and presented to the Commission or its designee who will, either (1) approve the recommended selection in whole or in part, (2) disapprove the recommendation, or (3) defer action on the selection for such reasons as a requirement for further evaluation. Interested parties will be given an opportunity to comment on staff's recommendation to the Commission. Each proposer will be notified in writing of the final action taken on the proposal submitted. In the case of the selected proposal, contract negotiations will commence shortly after notification.

- 4.2 Selection Criteria.** The criteria below will be used to evaluate the proposals and make the selection of finalists. The evaluation team will select a proposal based on the ability of the proposer to provide the best value for the services rendered, in addition to the proposer's ability to carry out all of the requirements contained in this RFP, demonstrated competence and qualifications of the proposer and the reasonableness of the proposed fees and expenses will be considered.

When other considerations are equal, preference will be given to a proposer whose primary place of business is in Texas or who will manage the project wholly from its offices in Texas. The PUC shall also give a preference among proposals that are otherwise comparable, to a proposal submitted by a HUB.

In scoring the criteria, the staff will attribute more weight to some criteria than others, to wit:

- A. Activity Plan The Activity Plan will be evaluated on the extent to which the proposal adequately describes the work to be performed and provides indicia of a clear understanding of the audit objectives; the propriety of the audit services the proposer will render; the reasonableness of the number of work hours expected for the tasks described; and the methods the contractor will use to fulfill the audit objectives. 40 points
- B. Professional Personnel Qualifications of the personnel who would be assigned to the audit will be measured by education and experience, professional certification, and overall auditing experience. The qualifications of the individuals who will participate in the audit, rather than the general experience of the consulting organization, will be of particular importance. 15 points
- C. Contractor Qualifications. These qualifications include the following: the ability of the contracting firm to meet the terms of the RFP and the Commission Audit Plan, including the time constraint; the financial ability of the firm to support the offered services; the quality and relevance of audits recently completed by the proposer; technical expertise; knowledge of the utility industry, especially telephone utilities; knowledge of the competitive local

telecommunications industry; knowledge of the Section 271 decisions rendered by the Federal Communications Commission; and independence from conflicting relationships. Proposals should include a listing of and references from clients for whom the proposer has conducted any audits of telecommunications companies in the past five years. References may be contacted. 15 points

- D. Cost. Cost will be assessed upon the reasonableness of the total project cost and the cost per person-hour. This criterion is not outcome determinative. 30 points
- E. Minority Participation. All other matters being equal, proposers will be given preference according to the degree to which their firm employs the services of minority individuals or minority subcontractors for this audit. 5 points
- F. Texas-based. All other matters being equal proposers headquartered in Texas will be given a preference. 5 points

## 5.0 PROJECT ADMINISTRATION

- 5.1 Client. This RFP is issued by the Public Utility Commission of Texas, who is the client for this study and the sole point of contact of the State of Texas for this RFP. The PUC is the sole client for purposes of directing the work of the contractor. The contractor will report to the PUC staff project coordinator during the course of the audit.
- 5.2 PUC Participation. The PUC staff project coordinator will be the sole source of contact at the Commission for the contractor. The staff project coordinator will monitor the study's progress to ensure satisfactory and timely performance of the contract when awarded, and approve payments. The Commission will rely on the staff project coordinator to remain informed about the progress and findings of the audit. The staff project coordinator or other staff members may observe or participate in portions of the audit.
- 5.3 Contract. The contract will be a three-party contract among the contractor, the Commission, and SWBT.
- 5.4 Compensation. SWBT shall bear all expenses associated with the audit, except for the time contributed by CLECs. Despite its responsibility for payments to the contractor under the resulting contract, SWBT has no role in directing the work of the contractor. The contractor shall be compensated for services at the prices, terms, and conditions established in its contract with the Commission and SWBT. Funding for the compliance audit is being provided by SWBT. Unless otherwise approved by the Commission, payments will be made based on the terms of the contract, which will include a provision for the retention of ten percent of the professional fees until completion of the project. Documentation for all expenditures will be directed to the PUC project coordinator and a designated SWBT employee for approval before payments may be issued. Total

payments under this contract will not exceed the total cost as agreed under the contract with the contractor without the express written approval of the Commission and SWBT.

**5.5 Reports and Project Control.** Because it is necessary for the PUC to remain informed of the progress of the study, the contractor must provide periodic oral and written reports in addition to frequent informal contact between the contractor and the PUC staff. The reports described herein are in addition to any conferences and oral or written reports required in the Commission Audit Plan. These reports, as well as other documentation required from the contractor, are described below:

- A. Weekly Informal Reports. Each week the contractor shall report to the PUC staff project coordinator in person or by phone the activities scheduled for the following week.
- B. Monthly Written Status Reports. An interim report shall be filed with the PUC staff project coordinator by the tenth working day following the month's end for any month worked. The interim report will consist of two parts:
  - 1. General narrative briefly describing progress to date and outlining reasons for any discrepancies between the audit schedule and progress to date. This narrative should contain a statement indicating the status of the study in relation to time ahead, behind, or on schedule.
  - 2. Status sheet indicating actual hours logged by category of professional fees (e.g., project manager, manager, senior consultant), and by category of expenses, showing percentage of each in relation to proposal costs.

**5.5 Invoices.** The contractor will submit monthly invoices to the PUC staff project coordinator and to a designated SWBT employee for approval. The invoice shall be categorized as follows:

- A. Professional Fees
- B. Per Diem or Meals Expenses
- C. Lodging Expenses
- D. Airfare Expenses
- E. Ground Transportation Expenses
  - 1. Taxi Fares
  - 2. Rental Cars
  - 3. Gasoline and Tolls
  - 4. Parking
  - 5. Mileage

F. Office Overhead Expenses

1. Photocopying
2. Deliveries
3. Phone Expenses

G. Support Services

1. Computer Services
2. Word Processing
3. Clerical Services

H. Other Expenses

The invoice shall be supported by a spreadsheet that itemizes the daily fees and expenses incurred by each audit team member. In addition, the contractor will accumulate at its offices (or elsewhere as agreed by the PUC staff and SWBT) supporting documentation for its charges, including individual time sheets, individual expense account sheets, and copies of receipts and other records necessary for invoice review. This documentation shall be available to the PUC or SWBT upon request.

Upon finding an invoice to be in order, the PUC staff project coordinator will forward the invoice for payment by SWBT. Uncontested portions of the invoices will be paid according to contract terms.

**5.6 Development of the Final Report.** The draft report and final report are defined as follows:

A. Draft Report. The PUC staff, SWBT and the CLECs will review the draft report, which will then be subject to factual verification by all parties. This process will ensure that material information is not omitted, and that the contractor has an opportunity to make any appropriate changes prior to writing the final report.

B. Final Audit Report. The Commission requires that the final report include the following:

1. A complete description of the results of the test for each objective, including but not limited to a sample size, populations size, number of samples that failed to meet the objective, etc.
2. All findings or irregularities that result from applying the agreed-upon procedures in the form of findings. The contractor will not apply a standard of materiality in determining whether to report findings; instead, SWBT and the participating CLECs will agree on, or in the absence of agreement, the Commission will determine whether such irregularities are material.

3. Summaries of audit results for data from each of the five participating states, Arkansas, Kansas, Missouri, Oklahoma and Texas.

The contractor shall provide ten copies of the report to the Commission and five to SWBT, to each of the participating CLECs, and to each of the participating state commissions. The Commission may request that one of its copies be a camera-ready copy.

To the extent the Final Report includes information that may be considered proprietary or confidential, the contractor will provide both redacted and non-redacted versions of the report to the Commission pursuant to Commission rules.

The contractor may be required to attend one or more meetings with Commission staff, SWBT and the CLECs in Austin, Texas to answer questions about the final report. Additionally, the contractor may be required to provide an oral presentation of the audit report to the Commission in Austin, Texas upon completion.

- C. Post-Final Report Remedial Plans and Corrective Action. The contractor will verify implementation of remedial plans and corrective action by SWBT as may be required in response to audit findings under section I.C.4 of the Commission Audit Plan.

## 6.0 CONDITIONS

- 6.1 Independent Price Determination. By submission of a proposal the offerer certifies the following:

- A. The prices in the proposal have been arrived at independently, without consultation, communication, or agreement for the purpose of restricting competition, as to any matter relating to such prices with any other offerer or with any competitor;
- B. Unless otherwise required by law, the prices that have been quoted in the proposal have not been knowingly disclosed by the offerer and will not knowingly be disclosed by the offerer prior to award directly or indirectly to any other offerer or to any competitor;
- C. No attempt has been made or will be made by the offerer to induce any other person or firm to submit or not to submit a proposal for the purpose of restricting competition.

- 6.2. Rejection of Proposals. The PUC reserves the right to reject any and all proposals as a result of this RFP. The PUC also reserves the right to negotiate separately with competing proposers, and to consider proposals or modifications thereof received at any

time before an award is made, if such action would be in the interest of the State. The PUC reserves the right to accept other than the lowest offer.

- 6.3 **Incurring Costs.** Neither the State of Texas, nor the PUC, nor employees of the PUC will be responsible in any manner for any costs incurred by any respondent to this RFP.
- 6.4 **Disclosure of Proposal Contents.** All proposals must be filed under seal with appropriate markings regarding confidentiality in Project 20400 in Central Records with a cover page on top. Please refer to PUC Procedural Rule §22.71(d)(1) regarding the filing of confidential materials. Portions of all proposals will be disclosed to interested parties after staff files its recommendation for selection with the Commission. The disclosed portions WILL NOT include information directly related to proposed pricing and expenses and other financial information provided by the proposer. In addition the PUC will not disclose any other portion specifically identified as confidential or proprietary that the proposer asserts is expressly excepted from disclosure under the Texas Public Information Act, Chapter 552 of the Texas Government Code, such as information made confidential by other law or that involves trade secret or competitive information that would cause substantial competitive harm to the proposer. Chapter 552, Texas Gov't Code, §§ 552.022 and 552.110.

Proposers must note clearly in the proposals those narrative sections and/or analyses that it considers are proprietary or confidential. For each requested instance of confidentiality, the proposer must cite the appropriate exception from the Texas Public Information Act, and proposer should state why the sections and/or analyses meet the statutory requirement. Such explanation should be presented in a sworn affidavit attached to the RFP. Vague and general claims to confidentiality will not be accepted. The PUC will be the sole judge as to whether a claim is general or vague in nature.

The PUC staff will recommend selection of a contractor to the Commission, and it will report to the Commission the reasons for such recommendation. Interested parties will have an opportunity to review the non-confidential portions of the proposals and to file comments with the Commission in response to staff's recommendation.

After execution of a contract all portions of the submitted proposals will be subject to disclosure under Chapter 552 of the Texas Government Code.

- 6.5. **Termination** The PUC reserves the right to terminate this project prior to its completion upon fifteen (15) days written notice. Contract terms will provide that, in the event of termination, the contractor will be paid for services rendered to the time of termination.
- 6.6 **Requesting Additional Information** The PUC reserves the right to request additional written data, information, oral discussion or presentation to support any written proposal or to clarify any aspect of any proposal.

**6.7 Required Contractor Certification.** By accepting the terms of the Contract, as amended, Contractor will certify that:

- A. Contractor has not given, offered to give, nor intends to give at any time hereafter any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant, to an employee or officer of the PUC, SWBT or a CLEC in connection with this contract.
- B. Contractor is not currently delinquent in the payment of any franchise tax owed the State of Texas in accordance with Article 2.45 of the Texas Business Corporation Act. .
- C. Under Section 231.006, Family Code, no individual or business entity named in this contract is ineligible to receive the specified grant, loan, or payment and acknowledges that this contract may be terminated and payment may be withheld if this certification is inaccurate.
- D. Neither contractor nor anyone representing contractor in this transaction has violated the antitrust laws of this State, codified in Section 15.01, et seq., of the Texas Business and Commerce Code or the Federal Antitrust Laws, nor communicated directly or indirectly to any competitor or any other person engaged in such line of business for the purpose of obtaining an unfair price advantage, for the purposes of this transaction.
- E. Contractor has not received compensation from Commission, or any agent, employee, or person acting on Commission's behalf for participation in the preparation of this contract.
- F. Contractor will comply with all federal, state, and municipal laws and regulations relating to discrimination against employees or applicants for employment based on race, creed, sex, color, religion, or national origin, including but not limited to the Federal and State of Texas regulations.

The proposer must commence and perform project activities according to the schedule described in the Activity Plan. Cost and schedule overruns may result in performance penalties, up to and including monetary penalties of \$1,000 a day, imposed by the PUC.

## **7.0 PROCEDURES FOR SUBMITTING PROPOSALS**

**7.1 Receipt of Proposals.** Proposals must be filed under seal with the cover page on the outside, in project No. 20400 in the agency's Central Records department by 3:00 p.m., on or before November 2, 2001 in order to be considered. Please refer to PUC Procedural Rule §22.71(d)(1). Documents should be addressed to the attention of: Ms. Jennifer Fagan, Legal Division, and/or Mr. Roger Stewart, Legal Division.

The PUC Central Records department is open for public filing Monday through Friday, 9:00 a.m. to 5:00 p.m., excluding holidays. Central Records is physically located on the ground floor of the William B. Travis Building, 1701 North Congress (17<sup>th</sup> and North Congress, two blocks north of the Capitol) in Room G-113, Austin, Texas 78701-1494.

The mailing address is:

Central Records, Room G-113  
Public Utility Commission of Texas  
William B. Travis Building  
P.O. Box 13326  
Austin, Texas 78711-3326

**NOTE: THE PUBLIC UTILITY COMMISSION OF TEXAS WILL NOT ACCEPT A U.S. POSTAL SERVICE POSTMARK AND/OR ROUND VALIDATION STAMP, MAIL RECEIPT WITH DATE OF MAILING STAMPED BY THE U.S. POSTAL SERVICE, A DATED SHIPPING LABEL, INVOICE OR RECEIPT FROM A COMMERCIAL CARRIER, OR ANY OTHER DOCUMENTATION AS PROOF OF RECEIPT OF ANY PROPOSAL. PROPOSERS ARE ADVISED THAT THE PUBLIC UTILITY COMMISSION OF TEXAS ASSUMES NO RESPONSIBILITY, DUE TO ANY CIRCUMSTANCES, FOR THE RECEIPT OF A PROPOSAL AFTER THE DEADLINE TIME AND DATE ESTABLISHED IN THIS RFP.**

**7.2 Number of Proposal Copies.** Proposers must submit one (1) original and seven (7) hard copies of the proposal. The proposal must remain valid for at least 90 days after the proposal due date, and it must be signed by an official authorized to bind the proposer to its provisions. The proposal must also contain a statement of compliance. Submission of a proposal constitutes agreement with the terms and conditions of this RFP.

**FASCIMILE (FAX) OR ELECTRONIC TRANSMISSIONS OF PROPOSALS WILL NOT BE ACCEPTED UNDER ANY CIRCUMSTANCES.**

**7.3 CD-ROM or 3.5" Floppy Disk(s) Supplement.** If technically capable, proposers are encouraged to include a CD-ROM or 3.5" floppy disk(s) in Microsoft Word 97 containing the proposal with the understanding that the CD-ROM or disk(s) do not replace the required hard copies. The CD-ROM or disk(s) must contain identical information to the hard copies.

**7.4 Addenda to the RFP.** In the event that it becomes necessary to revise any part of this RFP, an addendum will be posted on the PUC website ([www.puc.state.tx.us](http://www.puc.state.tx.us)), the Texas Marketplace ([www.marketplace.state.tx.us](http://www.marketplace.state.tx.us) or [www.esbd.tbpc.state.tx.us](http://www.esbd.tbpc.state.tx.us)) and mailed to any party that has requested a copy of the RFP.. If the proposal due date has passed, an addendum will be provided to each proposer that submitted a proposal. Proposers will be allowed a minimum of ten (10) days to respond to any such addenda.

**7.5 Other Requirements.** All proposals in response to this RFP must meet the following conditions to be considered:

- A. Proposals must be bound in a 3-ring binder.

- B. Proposals must be submitted in a manner which does not carry any benefit, keepsake, or value for members of the review panel or which presents any logistical problem for the members of the evaluation committee to return the entire proposal to the proposer.
- C. Proposals that address only part of the requirements contained in this RFP will not be considered.
- D. Additions or replacements to the proposal will not be accepted after the closing date for receiving the proposal in the Central Records of the PUC. Notwithstanding the foregoing, if the Commission adds an addendum to the RFP after the proposal was submitted, then proposers may submit a proposal specifically for the addendum.

PUBLIC UTILITY COMMISSION OF TEXAS

REQUEST FOR PROPOSALS FOR A COMPLAINT AUDIT  
OF  
SWBT PERFORMANCE MEASUREMENTS

Please be advised that our company does not wish to submit a proposal in response to the above captioned RFP for the following reasons:

- \_\_\_\_\_ Too busy at this time
- \_\_\_\_\_ Not engaged in this type of work
- \_\_\_\_\_ Project too large / small
- \_\_\_\_\_ Cannot meet RFP requirements
- \_\_\_\_\_ Other (please specify) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Company Name and Address

\_\_\_\_\_  
Signature

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_